
(2015) 11 SHI CK 0054
In the High Court Of Himachal Pradesh
Case No : RSA No. 424 of 2001

Nika Ram and Others

APPELLANT

Vs

Moti Ram and Others

RESPONDENT

Date of Decision : 21-11-2015

Acts Referred:

Evidence Act, 1872 — Section 114

Citation : (2015) 11 SHI CK 0054

Hon'ble Judges : Dharam Chand Chaudhary, J.

Bench : Single Bench

Advocate : Bhupender Gupta, Senior Advocate and Neeraj Gupta, Advocate, for the Appellant; O.P. Sharma Advocate and Naveen K. Dass, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Dharam Chand Chaudhary, J.—Plaintiffs are in second appeal before this Court. They are aggrieved by the judgment and decree dated 20.6.2001, passed by learned District Judge, Kullu, in Civil Appeal No. 86 of 2000, whereby the appeal has been dismissed and the judgment and decree passed by learned Senior Sub Judge, Lahaul and Spiti at Kullu, exercising the powers of Sub Judge 1st Class, Kullu, in Civil Suit No. 96 of 1998, affirmed.

2. The two Wills, i.e., Ext. DW-2/A dated 24.8.1992 and Ext. PW-3/A dated 28.1.1995 qua the estate of deceased Holu, predecessor-in-interest of the parties on both sides, are in dispute in the present lis. Deceased Holu was owner in possession of the following property:

"A (i) 3/6 share comprised in Khasra No. 3613, 3629, 3672, 3682, 3686, 3688, 3705, 3710, 3714, 3762, 3769, 3790, 3793, 3806, 3810, 3827, 3704, 3711, Kita 18, measuring 26-15-9 Bighas, Khata/Khatauni No. 8/10 min,

(ii) 1/6th share comprised in Khasra No. 3724, Kita 1, measuring 0-4-0 bigha, Khata Khatauni No. 207/440, situated in Phati Dukhari Gahar, Kothi Dugilag,

Tehsil and District Kullu, HP, as per Jamabandi for the year 1992-93.

B (i) 3/6 share comprised in Khasra No. 1339, 1351, Kita 2, measuring 10-9-0 Bighas, Khata Khatauni No. 266/338, situated at Phati Pichhli, Kothi Mangarh, Tehsil and District Kullu, HP, as per Jamabandi for the year 1991-92.

C (i) 3/6 share in a 2 1/2 storeyed state roofed house measuring 32x30 feet bounded as follows:

North: Vacant land of plaintiffs,

South: Govt. land,

East: Thoroughfare,

West: House of plaintiffs;

(ii) 3/6 share in a 2 1/2 storeyed state roofed house measuring 36" x 24" bounded as follows:

North: land of one Baryagi Ram,

South: Vacant Govt. land,

East: -do-,

West: House of plaintiffs;

(iii) 3/6 share in a house measuring 46" x 36" (two rooms) bounded as follows:

North: Vacant land,

South: Thoroughfare,

East: Land of plaintiffs

West: -do-;

(iv) 3/6 share in BHAR measuring 34" x 9" and one KHAL measuring 24"x 9", bounded as follows:

North: vacant place,

South: house of plaintiffs,

East: vacant place

West: thoroughfare;

situated at village Chlah Phati Dukhari Gahar, Kothi Dugilag, Tehsil and District Kullu, HP."

3. He expired on 15.5.1998. He was survived by his four sons, the plaintiffs, defendant No. 1 and his grand-sons, defendants No. 5 to 8 because his wife and two sons namely, Hari Ram and Maan Singh expired during his life time. As per the admitted case of the parties, deceased Holu executed a registered Will on

24.8.1992 (Ext. DW-2/A), however, according to the plaintiffs, since defendant No. 1 Moti Ram had managed the execution of the said Will by exercising undue influence upon said Shri Holu, therefore, the said Will was revoked and cancelled in the subsequent Will dated 28.1.1995 (Ext. PW-3/A) and thereby bequeathed his entire property in equal shares amongst his surviving sons and grand-sons. The plaintiffs, therefore, sought declaration to the effect that the Will dated 24.8.1992 is not a genuine document and as such the same as well as the sanction and attestation of mutation on the basis thereof be declared as illegal, null and void. The mutation was, therefore, sought to be declared as such and also cancelled.

4. Defendant No. 1 has contested the suit. In preliminary, objections qua its maintainability, concealment and suppression of material facts from the Court and that he is in exclusive possession of land measuring 2-19-0 Bighas over and above the land bequeathed in favour of other co-sharers, were raised. On merits, the Will executed on 24.8.1992 was stated to be a legal and genuine document. It was also claimed that the order of mutation passed by the Assistant Collector on the basis thereof is also legal and valid and attained finality being not assailed by the plaintiffs any further. Also, that the mutation was attested in the presence of both parties and the plaintiffs did not raise any objection thereto. The subsequent Will dated 28.1.1995, according to him, was never executed by deceased Holu. The same, therefore, is stated to be forged, fictitious and surrounded by suspicious circumstances.

5. Defendant No. 2 has also contested the suit by filing separate written statement, however, on the similar grounds as raised by defendant No. 1.

6. The remaining defendants, i.e., defendants No. 5 to 8 have filed the written statement and admitted the claim of the plaintiffs to be true and correct and defendants No. 3 and 4 did not contest the suit as they were proceeded against ex-parte.

7. In replication to the written statements filed on behalf of defendants No. 1 and 2, the plaintiffs have denied the contentions to the contrary raised therein being wrong and reiterated the case as set out in the plaint.

8. On such pleadings of the parties, the following issues were framed:

- 1) Whether deceased Holu executed a valid Will dated 28.1.95 in favour of parties? OPP.
- 2) Whether the deceased Holu executed a valid Will dated 24.8.92 in favour of the parties as alleged? OPD 1 & 2.
- 3) Whether the plaintiffs are in possession of suit property? OPP.
- 4) Whether the plaintiffs are estopped from filing the present suit? OPD.
- 5) Relief.

9. The parties were put to trial on the all issues and after holding full trial, learned trial Court has concluded that the Will dated 24.8.1992 (Ext. DW-2/A) is a document executed by deceased Holu legally and validly and as regard Will dated 28.1.1995 (Ext. PW-3/A), the same was held to be invalid and not proved to be executed validly and legally. The mutation attested on the basis of the Will Ext. DW-2/A was also held to be legal and valid. The suit as such was dismissed.

10. Learned lower appellate Court in appeal has affirmed the judgment and decree passed by learned trial Court on reappraisal of the given facts and circumstances and also the evidence available on record.

11. The legality and validity of the impugned judgment and decree has been questioned on several grounds, however, mainly that the Courts below have misread and misconstrued the evidence available on record and arrived at a conclusion not legally sustainable. The execution of the subsequent Will Ext. PW-3/A is stated to be proved on record, however, the conclusion to the contrary drawn is not legally sustainable. The findings that the Will Ext. PW-3/A is shrouded by suspicious circumstances are also stated to be illegal and contrary to the evidence available on record. The findings that the plaintiffs have not assailed the order of mutation are stated to be contrary to law as the mutation does not confer any title. The Will Ext. PW-3/A later in point of time should have been held as a legal and valid document. The earlier Will Ext. DW-2/A otherwise had stood cancelled and revoked on the execution of the Will Ext. PW-3/A.

12. The appeal has been admitted on the following substantial questions of law:

1) Whether both the Courts below have wrongly raised adverse inference by relying upon the provisions of Section 114 of the Indian Evidence Act in not producing the register by Petition Writer Shri Chhering Ram, who appeared as PW-3, being the scribe of the Will Exhibit PW-3/A? Have not correct principles of law been misunderstood and misapplied resulting in erroneous and perverse findings?

2) Whether both the Courts below have put reliance on inadmissible evidence, i.e., alleged statement made by Shri Chhering Ram during the time of attestation of the mutation, when the said statement was neither proved in accordance with law, are not the findings of both the Courts below vitiated by relying on inadmissible evidence which material affected the decision of the case?

3) Whether both the Courts below have in a highly erroneous and perverse manner rejected the testimony of PW-3 and PW-4 who were scribe and marginal witness of the due execution and attestation of the Will Exhibit PW-3/A, when no cogent evidence was proved on record justifying the rejection of the testimony by both the Courts below? Have not both the Courts below acted in a perverse manner in presuming such circumstances which were absolutely erroneous and illegal to hold that due execution and attestation of PW-3/A does not stand established?

4) Whether both the Courts below have resolved the principles of estoppel against the plaintiffs, by not raising the objection in the mutation proceedings without appreciating that the mutation proceedings are not the forum to contest the title and the mutation does not confer any title?

5) Whether both the Courts below have misread the oral and documentary evidence in upholding the due attestation and execution of the Ext. DW-2/A which was shrouded by suspicious circumstances?

6) Whether both the Courts below have ignored from consideration the fact that the Will which was later in point of time and equitably distributed property among the heirs, ought to have been upheld, which revoke the Will propounded by the defendants?

13. It is worthwhile to mention here that the appeal was decided by a Coordinate Bench of this Court vide judgment and decree dated 18.7.2012. Respondent-defendant No. 1, however, assailed the same in the Apex Court by filing Civil Appeal Nos. 3081-3082 of 2015. Since substantial questions of law were neither discussed nor any findings recorded, therefore, the Apex Court has been pleased to quash the judgment and to remit the case to this Court for fresh adjudication in accordance with law. Therefore, this appeal landed again in this Court for disposal.

14. Shri Bhupender Gupta, learned Senior Advocate while taking this Court through the judgment under challenge, has urged that the Will dated 28.1.1995 (Ext. PW-3/A) being later in time and duly proved in accordance with law, is last and final Will of deceased Holu and that both Courts below have committed an illegality and irregularity in discarding the same and erroneously believing the earlier Will dated 28.4.1992 (Ext. DW-2/A) to be the last and final Will of the deceased.

15. On the other hand, Shri O.P. Sharma, learned Senior Advocate, while repelling the arguments addressed on behalf of the appellants-plaintiffs, has forcefully contended that as per the overwhelming evidence available on record, the testator during his life time used to reside with his son respondent-defendant No. 1 and it is for this reason the said defendant was given 2 Bighas 19 Biswas of land in addition to his other legal heirs, the plaintiffs and defendants No. 5 to 8 (grand-sons) because his wife and two sons namely, Hari Ram and Maan Singh expired during his life time. The Will Ext. PW-3/A propounded by the plaintiffs is stated to be surrounded by suspicious circumstances and even not proved also in accordance with law. Therefore, according to Shri Sharma, no interference with well reasoned judgment under challenge in the present appeal is warranted.

16. Substantial questions of law No. 1, 2, 3 and 5 relate to the execution of two separate Wills, i.e., Ext. PW-3/A and Ext. DW-3/A by deceased Holu and the genuineness and authenticity thereof viz-a-viz, the evidence produced by the parties on both sides to prove the execution thereof.

17. The complaint is that non-production of register by PW-3 Chhering Ram, Petition Writer and also his statement as well as that of marginal witness Shri Jindu Ram (PW-4) having been misread and misconstrued while arriving at a conclusion that the execution of the Will Ext. PW-3/A has not been proved in accordance with law. The further grouse is that the evidence produced by respondent-defendant No. 1 Moti Ram to prove the execution of Will Ext. DW-2/A, has not been appreciated in its right perspective and the findings that the execution of the said Will stand duly proved, are erroneous and as such not legally sustainable.

18. As a matter of fact, these questions of law need reappraisal of the evidence available on record for its adjudication.

19. There is no quarrel so as to the execution of the Will Ext. DW-2/A, which as a matter of fact having been executed on 24.8.1992 is prior in time. There is again no quarrel so as to respondent-defendant No. 1 Moti Ram was given 2 Bighas 19 Biswas of land bearing Khasra Nos. 3793, 3806 and 3810 vide this document in addition to his share in the estate left behind by the testator Shri Holu as compared to other co-sharers, i.e., the plaintiffs, respondent-defendant No. 1 and defendants No. 5 to 8, the grand-sons because of the death of their fathers S/Shri Hari Ram and Maan Singh. The only distinction in the two Wills is giving of 2 Bighas 19 Biswas of land in addition to his own share to Shri Moti Ram (defendant No. 1) in lieu of the services he rendered to deceased during his life time.

20. The pivotal question arises, would, therefore, be that the said defendant has satisfactorily proved the factum of deceased Holu living with him and looked after by him or not. There cannot be said to be much quarrel qua this aspect of the matter for the reason that one of the plaintiffs Shri Nikka ram has stepped into the witness box as PW-1 and in his cross-examination has admitted in so many words that deceased Holu used to reside with Moti Ram (defendant No. 1). He further admits that even in the Panchayat register also deceased Holu was shown to be residing with Shri Moti Ram aforesaid. Therefore, his testimony in cross-examination that deceased Holu was being looked after by all the sons, is wrong, more particularly when he has admitted that all the brothers were residing separately and so far as he is concerned, according to him, the entries of his family were made in Gram Panchayat, Dogri, admittedly a different Gram Panchayat from that where the suit land is situated. Not only this, but he has not denied the suggestion that 2 Bighas 19 Biswas of land was given to Moti Ram in lieu of the services he rendered to the deceased and rather expressed his ignorance to the suggestion made in this regard. Meaning thereby that he has admitted the deceased Holu was being looked after by Moti Ram. Similarly, he has not denied the suggestions that land bearing Khasra Nos. 3793, 3806 and 3810 was given by deceased Holu to Moti Ram in lieu of the services he rendered to him. No doubt, he has expressed his ignorance to the suggestions made in this regard, which tentamounts to admission. It is thus seen that besides own

testimony of defendant No. 1 Moti Ram, his case that 2 Bighas 19 Biswas of land bearing Khasra Nos. 3793, 3806 and 3810 was given to him in addition to his share in the entire land left behind by deceased Holu in lieu of the services he rendered to him, the same stands substantiated from the testimony of PW-1 Nikka Ram also.

21. Interestingly enough, PW-1 has admitted the sanction and attestation of the mutation of the property left behind by deceased Holu on the basis of the Will Ext. DW-2/A and also that consequently each co-sharer is in possession of their respective shares in the land in question. Therefore, his own testimony belies the plaintiffs' case that deceased Holu has cancelled the Will Ext. DW-2/A and executed another Will on 28.1.1995 (Ext. PW-3/A).

22. Testator Shri Holu has expired on 5.5.1998. On his death both the Wills were produced before the revenue authorities for sanction of the mutation. Assistant Collector Second Grade not only associated the witnesses to the Will Ext. DW-2/A, but also Will Ext. PW-3/A and taking into consideration that the scribe of the Will Ext. PW-3/A Shri Chhering Ram has himself stated that it was deceased Holu who alone was produced before him at the time of execution of the Will or any one else, is not known to him and also that the marginal witnesses failed to prove the due execution of the said Will and while holding the Will Ext. DW-2/A to be the last and final Will of deceased Holu, attested the mutation on the basis thereof in the presence of the plaintiffs vide order of mutation Ext. DW-1/B. The order of mutation has not been assailed by the plaintiffs and as such has attained the finality.

23. No doubt, the sanction and attestation of mutation do not confer any title qua the property in dispute, however, in a given situation when the mutation was sanctioned and attested in the presence of the plaintiffs and to their knowledge and notice due weight-age is required to be given to the same. When as per own version of PW-1 after the attestation of mutation Ext. DW-1/B they are in possession of the suit land to the extent of their respective shares, there is no question of propounding of another Will Ext. PW-3/A the execution whereof otherwise is also not proved in accordance with law. When Chhering Ram, the scribe, while in the witness box as PW-3 tells us that he has maintained the register to make entries of the documents he scribes, it is not understandable as to what prevented him from producing the said register, particularly when it was sought to be produced as per list of witnesses available in the trial Court's record. No plausible explanation is forth coming to satisfy the Court as to why he failed to produce the register. Both the Courts below have, therefore, not committed any illegality and irregularity while raising an adverse inference, as envisaged under the provisions of Section 114 of the Indian Evidence Act against the plaintiffs. Both the Courts below have also not committed any illegality and irregularity in taking note of the statement made by PW-3 Chhering Ram before the revenue authorities that it was not within his knowledge that it is only Holu who alone was produced before him at the time of execution of the Will Ext.

PW-3/A or someone else. As a matter of fact, the Courts below have not held so only on the basis of recital in the order Ext. DW-1/B in this regard, but Chhering Ram while in the witness box as PW-3, has admitted such statement having been made by him before the revenue authorities during the course of mutation proceedings.

24. Now if coming to the marginal witness Jindu Ram (PW-4), he seems to be a stock witness because he tells us that he generally remains present in the Court complex. Otherwise also, he is resident of village Bhagan, which, according to him, is at a distance of 14 kilometers from village Chalah where the suit land is situated. It is he who identified Shri Holu, the testator, before the scribe PW-3 and also the Sub Registrar. How he could have identified the testator when he is residing at a place 14 kilometers away from his place. Therefore, both the Courts below have not committed any illegality and irregularity in rejecting the testimony of PW-4. In such a situation, both the Courts have not committed any illegality and irregularity while arriving at a conclusion that execution of Will Ext. PW-3/A is not proved in accordance with law.

25. On the other hand, the execution of the Will Ext. DW-2/A for the reasons already recorded and also that the execution thereof finds support from own testimony of respondent-defendant No. 1 Moti Ram and also the scribe DW-2 Shri Bhavneshwar Dutt as well as the marginal witness Bir Chand (DW-3), who is none else but also the Pradhan Gram Panchayat. Otherwise also, the Will Ext. DW-2/A seems to be the last and final will of deceased Holu because he was justified in giving 2 bighas 19 Biswas extra land to respondent-defendant No. 1 Moti Ram, as it is the said defendant who used to render services to him during his life time. In such a situation, the present is not a case where the lower appellate Court has committed any illegality and irregularity while raising an adverse inference against the appellants-plaintiffs. It is also not the case where the evidence produced by the parties on both sides in proof of the Will Ext. PW-3/A and Will Ext. DW-2/A has been misconstrued or mis-appreciated. Therefore, substantial questions of law No. 1, 2, 3 and 5 not at all arise for adjudication in this appeal nor the judgment and decree under challenge on that count to be termed as legally unsustainable.

26. If coming to substantial question of law No. 4, when the mutation was sanctioned and attested in favour of the parties on both sides on the basis of Will Ext. DW-2/A in their presence and after affording them due opportunity of being heard and as the plaintiffs not opted for challenging the order of mutation Ext. DW-1/B, therefore, both the Courts below have not committed any illegality and irregularity while arriving at a conclusion that they are estopped from propounding a subsequent Will dated 28.1.1995 (Ext. PW-3/A). Thus substantial question of law No. 4 also does not arise for adjudication.

27. Similarly, it is also not always necessary that a Will later in point of time should be believed to be last and final will of the testator. When the execution of such subsequent Will Ext. PW-3/A is not proved in accordance with law, both the

Courts below have not committed any illegality and irregularity in discarding the same while arriving at a conclusion that the same is not a genuine document nor contains the last will of the testator. Therefore, on this score also, the findings recorded by both Courts below not suffer from any illegality or infirmity and as such the substantial question of law No. 6 not at all arises for adjudication in the present appeal.

28. In view of what has been said hereinabove, no question of law what to speak of substantial questions of law as formulated arise for determination in the present appeal. The judgment and decree under challenge is rather legally and factually sustainable and calls for no interference by this Court.

29. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. No order so as to costs.